No. 4443

United States
Circuit Court of Appeals
For the Ninth Circuit

In the Matter of DAVID A. JACOBSON, Bankrupt.
KATIE WERNER,

Petitioner,

vs

HOMER F. ALLEN, as Trustee of the Estate of DAVID A. JACOBSON, Bankrupt, PHOENIX SAVINGS BANK AND TRUST COMPANY, a corporation, and NORTHERN TRUST COMPANY, a corporation.

Respondents.

Brief of Respondents

HENDERSON STOCKTON and EARL F. DRAKE,
Attorneys for Respondent, Homer F. Allen.
ARTHUR E. PRICE,
Attorney for Respondent, Phoenix Savings Bank & Trust Company, a corporation and Northern Trust Company, a corporation.

THE CHANDLER ARIZONAN, CHANDLER, ARIZONA

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KATIE WERNER, Petitioner, v. HOMER F. ALLEN, as Trustee of the Estate of DAVID A. JACOBSON, Bankrupt, PHOENIX SAVINGS BANK & TRUST COMPANY, a Corporation, and NORTHERN TRUST COMPANY, a corporation, Respondents.

In re Petition of KATIE WERNER to Superintend and Revise.

RESPONDENTS' BRIEF

STATEMENT OF THE CASE

Respondents cannot adopt the statement of the case made by petitioner for the reason that the petitioner fails to make any reference whatever to the documentary evidence in the form of stipulation, petition, objection and orders upon which the order

of the referee and of the District Court in approving the order of the referee were primarily based. When the petitioner filed her petition for revision in this court she filed no praecipe with the clerk of the lower court specifying what papers she desired to have forwarded. The clerk sent up nothing at her request; instead petitioner's counsel independently forwarded only such portion of the record as best subserved their purpose. Thereupon respondent, Homer F. Allen, filed a praecipe asking that the entire record be sent to this court and after the expiration of ten days the District Judge entered an order requiring certified copies of the entire proceedings to be forwarded as necessary for a proper review. The clerk of the lower court has but recently transmitted to this court certified copies of the entire record and they are now on file herein. In this statement of facts and brief we will accordingly be compelled to refer to the additional documents without reference to a printed transcript of them.

David A. Jacobson filed a voluntary petition in bankruptcy in the District Court of the United States for the District of Arizona, Phoenix Division, on the 25th day of July, 1923. Said Bankrupt was represented by Zimmerman & Mulhern, as his attorneys. Thereafter and on the 31st day of July, 1923, said Jacobson was adjudged a bankrupt. The matter of

his bankruptcy was referred to R. W. Smith, one of the referees of said Court at Phoenix. Thereafter respondent, Homer F. Allen was elected trustee and duly qualified. In said bankruptcy proceedings attorneys, Zimmerman & Mulhern, not only represented said bankrupt and Katie Werner, petitioner herein, but also were attorneys of record for Reuben Jacobson, Ray Jacobson, a sister of the bankrupt and Harry J. Collis (T. R. 31), all claiming to be secured creditors.

The assets of this estate consisted almost entirely of real estate, heavily encumbered. In many instances the several parcels had as many as four mortgage liens upon them. (See trustee's petition for sale of real estate and stipulation with regard to liens.) Of the total real estate coming into the hands of the trustee there are directly involved in this matter only lots 25, 26, 27 and 28 of the town of Chandler, Arizona. But, there are also indirectly involved lots 36, 37, 38 and 39, likewise of the town of Chandler, Arizona, for the reason that said lots 36, 37, 38 and 39 were sold pursuant to the same proceedings, and the same order. Respondent, Phoenix Savings Bank & Trust Company held a first mortgage lien upon lot 25. The Northern Trust Company, a corporation, had a first mortgage lien upon lots 26, 27, and 28. Suits in the Superior Court of the State of Arizona, in and for Maricopa County, were filed to foreclose said mortgages upon said real property. One Harry L. Hancock held a

third mortgage upon lot 25 and a second mortgage upon lots 26, 27 and 28. Her mortgages secured four thousand Dollars of indebtedness. Zimmerman & Mulhern, representing the bankrupt, Katie Werner and other persons, insited that action be taken by the trustee to enjoin said foreclosure actions in the state court and to obtain a sale of the above property in bankruptcy. (See Werner's petition for order vacating stipulation). The trustee took the position that the actions in the state court could not be stayed and sales be had in bankruptcy except upon stipulation of all lien claimants, for the reason that the encumbrances against the property were largely in excess of its full value. Therefore a stipulation, certified copy of which is on file herein, was entered into by all of the parties having liens or encumbrances upon the said lots 25, 26, 27 and 28, with the exception of Harry L. Hancock. Based upon this stipulation a petition was filed by the trustee for an order to sell said lots 25, 26, 27 and 28 and other real property free and clear of liens and encumbrances. An order to show cause why the property in question should not be sold was served upon counsel for petitioner herein who accepted service on behalf of Katie Werner (T. R. 31). The order to show cause, as well as the petition on which it was based had a double aspect (T. R. 29, 30) ordering the parties in interest to show cause first, why the property in question should not

be sold irrespective of the price it would bring, *"and further* why an order should not be made" that this property and other property be sold conditioned upon the purchase price being sufficient to liquidate the second mortgage upon lot 25; Katie Werner held a liens and encumbrances. Petitioner and other lien creditors who signed the stipulation agreed therein that the property in question should be sold irrespective of the encumbrances against it and made no condition whatever as to the amount which should be realized on the sale. The referee, finding no other parties interested insofar as the property here involved was concerned, on December 3, 1923 made as to this property an absolute order of sale, irrespective of the purchase price, and counsel representing petitioner, though present, made no objection thereto, as will appear from the recitals in the order (T. R. 32). Counsel representing Katie Werner, filed on December 28, 1923 a petition seeking an order vacating and setting aside said stipulation, and for an order terminating obligations and responsibilities thereunder. (certified copy of petition on file herein.) But none of the objections now raised by opposing counsel were raised by them in said petition. An answer to said petition was filed January 21, 1924, by the trustee. After a hearing where evidence was introduced, the referee made written findings of fact, conclusions of law, and an order denying the petition and adjudg-

ing the stipulation to be in full force and effect. (copies of answer and order on file herein) No review was taken.

Pursuant to the order of sale, notice was given as shown in the trustee's return on record here. No bidder appeared except the first mortgagee by their counsel, who desired to make the bid in the presence of the referee, and all parties in interest. Thereupon, the place of sale was adjourned to the referee's office in the same city, and all interested parties were notified and appeared. Thereupon the first mortgagee presented its bid, which was there accepted and approved after a hearing. Order of confirmation was entered March 3, 1924, and any agrieved party was given ten days in which to review the order approving same. (T. R. 50). Petitioner, by her counsel, was present and no review was taken.

After the sale of the property in question written objections of Katie Werner to the secured claims of the Phoenix Savings Bank & Trust Co., and the Northern Trust Co., and to allowance of fees and expenses, were filed February 12, 1924, but no objection to the manner or terms of the sale was then made. Thereafter a hearing was had, evidence was introduced and the referee entered an order overruling the objections of Katie Werner to said secured claims and to the allowance of fees and expenses. Any aggrieved party

was given ten days in which to review said order. No review was taken.

On October 13, 1924 (T. R. 65), over eight months after the sale of the property in question (T. R. 44) and over seven months after the order confirming the sale (T. R. 50, 53) Katie Werner filed before the referee a petition for an order setting aside the order of sale, the sale and order confirming sale. The referee entered an order dismissing the petition. On review the District Judge approved and confirmed the order of the referee.

ARGUMENT

The order of sale as actually entered was clearly within the jurisdiction of the referee.

Jurisdiction, in the first place, was acquired by the stipulation signed by the attorneys of Katie Werner and other lien holders. A certified copy of this stipulation is on file herein. It is dated November 8, 1923 and recites that Katie Werner is party of the third part, there being five formal parties thereto. After a recital of pending mortgage foreclosure proceedings to some of which Katie Werner was a party, there follows an agreement as to the validity and amount of various liens. Beginning on page ten of the stipulation we quote verbatim the following pertinent paragraphs:

"That the real property herein before and in this paragraph number 13 described, shall be sold by the party of the fourth part, Homer F. Allen, as trustee in bankruptcy of the estate of David A. Jacobsen on any date not later than 90 days from the date hereof free and clear of all liens against said property except leases on the same that are now valid, but from the claims of any assignees of such leases, the purpose being that the purchaser shall receive any rents accruing after the date of sale; that the lien of the parties hereto as it now exists shall be automatically and forthwith transferred from the real property to the proceeds derived from the sale thereof; that any of the parties hereto may be a bidder at said trustee's sale and the amount due the respective parties hereto in order of their mortgage lien rights may be applied in payment of the purchase price if such party is the successful bidder at the trustee's sale except that in all events there shall be paid in cash a sum equal to the expense of administration in bankruptcy upon the particular property herein described, including among other items, expenses of sale, referee's commission, trustee's fees and commission and attorney's fees of attorney for trustee. The real property described as lots 25, 26, 27, 28, 36, 37, 38 and 39 in the Town of Chandler, Maricopa County, Arizona, according to the map or plat thereof on file and of record in the office of the County Recorder of Maricopa County, Arizona."

(15) "It is further stipulated and agreed that all persons who have or assert liens upon the real property herein described shall be bound by the terms hereof upon assenting hereto in writing by the signing of this stipulation and any lien that exists in fact shall be automatically and forthwith transferred to the fund

derived from a sale of the property by the trustee to the same extent as the lien previously existed against the property itself."

(19) "Where all the persons having or asserting liens against the property described in the several first mortgages separately and the actions now pending in the state court shall fail to assent hereto or enter into a like stipulation as this stipulation within fifteen days from and after date hereof and in which said actions as to the property therein involved as a whole the Bankruptcy Court shall not have entered an order for sale free of liens and encumbrances on or before twenty days from the date hereof any one or more of such actions shall proceed in the state court of the party of the fourth part hereto shall file an answer therein and no action shall be taken in the bankruptcy proceeding to stay such suit."

(21) "Agreed and accepted by the parties hereto that Katie Werner executes the foregoing stipulation only in so far as her substantial rights and claims are involved and for the purpose of obtaining without legal formalities an order of sale of this court to sell the aforesaid described properties free from all liens and for the further purpose of causing dismissal forthwith after order of sale of any and all suits pending in the state courts affecting said properties."

Trustee in Bankruptcy of David A. Jacobson, Bankrupt, Party of the Fourth Part.

(*Signed*) Henderson Stockton, Attorney for Party of the Fourth Part.

The following persons have assented to the foregoing stipulation.

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.....

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.....

.....

Phoenix Savings Bank & Trust Company, a corporation

By .....

Party of the First Part

Northern Trust Company, a corporation

By .....

Party of the Second Part.

Bank of Chandler, a corporation

By .....

Party of the Fifth Part.

(*Signed*) Arthur E. Price, Attorney for parties of first, second and fifth part.

.....

(*Signed*) Zimmerman & Mulhern, Attorneys for party of the third part only.

Filed November 10, 1923.

We leave the foregoing stipulation to speak for itself. In view of it there is no opportunity for opposing counsel to argue with any show of success that the referee did not acquire jurisdiction to enter an order of sale without condition as to the amount to

be received therefrom. Without any further legal proceedings or any order toshow cause we submit that so far as the parties to the stipulation were concerned the referee would have been legally justified in entering an unconditional order of sale based only on the stipulation. As shown by the certified copies of petition and order on file herein counsel for Katie Werner subsequently sought to relieve her from the obligation of this stipulation, but only on the ground that two of the suits in the state court had not been discontinued. Nothing was alleged in the petition for relief as to lack of authority of the attorneys to sign on behalf of their client, or as to any misunderstanding as to the terms of the stipulation. Petitioner never sought to review the order denying the petition and upholding the continued effect of the stipulation.

However even though the stipulation be entirely disregarded the order of unconditional sale was clearly within the issues as presented by the petition of the trustee and order to show cause based thereon. The verified petition for the order to show cause why the real estate should not be sold, after stating the known encumbrances against the property, alleged (T. R. 23) "that your trustee cannot ascertain the amount of further encumbrances against said property for the reason that all further encumbrances on said property are likewise encumbrances upon other properties here-

in described and property not herein described," and then, after alleging the making of the stipulation in question which was described as providing for a sale free from liens with no mention made as to any condition with regard to purchase price, the petitioner prayed (T. R. 25, 26) for an order to show cause in precisely the form in which the order was issued. Note the exact wording of the two-fold issue raised in the order to show cause. First, cause was to be shown why the property in question should not be sold (T. R. 29) "free and clear of all liens and encumbrances, the liens now existing upon said property to be transferred to the proceeds derived from a sale thereof; *and further* why an order should not be made" etc. In the foregoing order to show cause we find a clear cut issue, complete in itself, followed by a semi-colon and language emphatically separating the subsequent and further order prayed for from what precedes. Consequently by the petition and order to show cause Katie Werner was served with notice that an order was sought requiring sale of the property in question, but no other property, free from liens, with absolutely no restriction or conditions as to the purchase price which must be received. Secondly, the petition and order to show cause raised another "*and further*" issue as to why the property in question *and other property not included in the first issue* should not be sold free from liens, "conditioned upon the

purchase price at trustee's sale of said property and of lots 25, 26, 27, 28, 36, 37, 38 and 39, being sufficient to pay all of the liens against all of the said property." The purpose in thus framing two issues first as to the property in question alone without condition as to selling price and second, as to this property and other property conditioned as to selling price, is made clear by the contents of the trustee's petition which recites (T. R. 23, 24) that the exact number of outstanding liens against all of the property could not be ascertained, but that by stipulation certain lien holders, including Katie Werner, had agreed that at least the property in question could be sold free from liens and encumbrances. Therefore it is evident that the trustee sought to have a separate order of sale of these lots in Chandler, Arizona free from liens and without condition as to price unless unknown lien holders, not included in the stipulation, might appear and object. If no such lien holders were found to exist then the sale of the property in question could proceed by stipulation. But to guard against possible objection by other unknown lien holders the second issue was raised and the property in question included therein with other property so as to provide for all contingencies.

We submit, therefore, that the order of sale as actually made was clearly within the scope of the petition and the order to show cause.

IRREGULARITIES IN THE ADVERTISEMENT, MANNER AND PLACE OF SALE IN QUESTION AT MOST RENDERED THE SALE VOIDABLE, NOT VOID.

(Assignments of Error Nos. 2 and 3.)

Opposing counsel, throughout their brief, contend that the judicial sale in the instant case was absolutely void and in effect concide that if it was merely voidable it cannot be set aside in this proceeding. We agree that the sale must be shown to have been absolutely void. If voidable, only, the order of confirmation cured any irregularities to which objections might otherwise have been raised. The order of confirmation operates like any other final adjudication. The rule is thus stated in 16 R. C. L. p. 83.

"Furthermore the order confirming or refusing to confirm a judicial sale is a final and conclusive judgment, with the same force and effect as any other final adjudication of a court of compentent jurisdiction determining until set aside and as against collateral attack, the rights of all parties, and concluding as by a judicial decree all matters involved in the scope of the proceeding, including those the court might have been called to pass upon had the parties chosen to have brought them forward as objections to the confirmation." (Citing several United States Court cases.)

It will be noted that the instant proceeding is not brought to review the order of confirmation. The sale was confirmed on March 3, 1923 (T. R. 50). It was not until over seven months thereafter on

October 13, 1924 (T. R. 65) that petitioner filed her petition to set aside the proceedings. If the sale was void mere confirmation or subsequent delay could not validate it. But if merely voidable the sale cannot now be attacked by petitioner.

The rule clearly announced by the authorities and supported by principle is that a court *having jurisdiction of the parties and subject matter* may confirm or ratify any departures from its order of sale provided the court might have authorized the procedure or terms of sale in the first instance. The rule is thus stated in Freeman on Void Judicial Sales No. 21:

"It is sometimes said that a sale under a decree must pursue the directions therein contained, that a departure from these directions renders the sale void. But to invoke this rule the departure must be of a very material character. xxx In truth the court is not absolutely bound by the terms of its order or decree respecting the mode of the sale. xxx If the court had the power to direct the terms of the sale in the first instances, it may change them afterwards, and if any officers or any other agent of the law, or of the court in making a sale departs from the directions of the decree, the court may nevertheless, by confirming the sale, ratify his action, provided always that the terms so ratified are such as the court had power to impose in the first instance."

The foregoing language of the leading text writer on the subject of void judicial sales was quoted with approval in Bechtel v. Wier 93 Pac. 75, 77, 152 Cal.

443 in which case a decree of foreclosure specifically directed that two certain parcels of real estate be sold separately in a given order and only in case of a deficiency after a separate sale of the first should the second parcel be sold. Yet the sheriff sold both parcels in one lot. Upon collateral attack the court held that the sale was not void, but voidable only, citing other cases to the same effect. Likewise in Humboldt Society v. March 136 Cal. 320, 68 Pac 968 the same court said:

"Whether a motion to vacate a sale of property, made in execution of a judgment, on account of some irregularity on the part of the officer making the sale, should be granted rests very largely in the discretion of the court before which the motion is made; and it is immaterial whether such irregularity consists in disregarding the provisions of the statute in making the sale, or in failing to observe and follow some express direction in the judgment."

The case of Buchtel vs. Wier supra is cited with approved in the late Idaho case of Cohlan v. City of Boise 212 P. 867.

This same statement of the rule is adopted by District Judge Howley in Nevada Nickle Syndicate v. National Nickel Co. 103 F. 391. In that case there was insufficient publication of notice of a judicial sale of real estate and the publication failed to comply with act, March 3, 1893, sec. 3 (27 Stat. 751) requir-

ing that "no sale of real estate under any order, judgment or decree of any United States court shall be had without previous publication of notice of such proposed sale being ordered and had once a week for at least four weeks prior to sale." In holding that a departure from the statute rendered the sale only voidable the court said at page 399 of the opinion:

"The provision of the statute of the United States requiring that in all cases four weeks' notice should be given of the time of sale was intended for the benefit and protection of the judgment debtor, and created a priviledge and right which the judgment debtor in any case may insist upon or waive. In the present case the right so given was waived by the failure of defendant to make any objection upon that ground prior to the confirmation of the sale."

We earnestly request an examination of the foregoing opinion of Judge Howley, especially because of the numerous quotations therein of authorities relating to the distinction between void and voidable sales.

In Klapneck v. Kletz 40 S. E. 570, 571 (W. Va.) the court said:

"It does not matter whether the decree of sale was erroneous, or whether the commissioners acted without authority in receiving the private bids or in failing to advertise. These are all objections that could have been made before confirmation, but came too late after the sale has been confirmed without any excuse being offered why they were not made sooner

(citing earlier W. Va. cases). 'For as we have seen though a commissioner be directed to sell at public auction and he sells privately and the court confirms the sale the decree of confirmation cannot be disturbed.' "

In Griffith v. Bogert 18 How. 158, 164 execution was issued and sale occurred before the expiration of a stay of execution. In other words here was a case in which proceedings took place in direct opposition to the order of the court that no such execution and sale should occur during the period referred to in the order. However the sale was later confirmed by the lower court and the Supreme Court held in effect that the trial court could confirm the sale, because it could have authorized it in the first instance. The sale was held to be merely voidable, the court saying:

"The issuing of an execution on a judgment before the stay of execution has elapsed or after a year and a day without reviewing the judgment, *the want of proper advertisements by the sheriff*, and other like irregularities may be sufficient ground for setting aside the execution or sale on motion of a party to the suit or anyone interested in the proceedings; but when the objections are waived by them and the judicial sale founded on these proceedings is confirmed by the court, it would be injurious to the peace of the community and the security of titles to permit such objections to the title to be heard in a collateral action."

In 16 R. C. L. p. 85 the rule herein contended for that a court may confirm what it might have authorized in the first instance is stated to be the law and numerous instances of departures from orders of sale are cited as mere irregularities cured by adoption and approval of the court.

"The final order of confirmation, having the effect of a final conclusive judgment, cures all irregularities, misconduct and unfairness in the making of the sale, *departures from the provisions of the decree of sale*, and errors in the decree and the proceedings under it; and if the court had jurisdiction and the officer the authority to sell, it makes the sale valid as against collateral attack even though irregular and voidable before and though grounds sufficient to have prevented confirmation existed. Thus, confirmation concludes all objections based upon the *want of proper advertisement of sale by the officer selling, irregularities in the time and place of sale or in giving the date in the notice thereof*, especially if these be trivial and such as could mislead no one, or upon the fact that the lands being sold were not in the township in which they were described to be in the notice of sale. *So although the terms of sale as reported differ from the terms of the decree under which the commissioners were acting, the confirmation of their report by the court will cure the irregularity and give the sale the same validity and effect as if they had sold upon the precise terms of the decree.* Accordingly, where commissioners sell by the acre without specific authority, the court by confirming the sale adopts and approves their act, and cures the irregularity, and confirmation concludes all questions as to the validity of the sale

grounded upon the fact that the *officer adjourned the sale to a time different from that fixed in the order of sale.*"

In Robertson v. Howard 229 U. S. 254, 264 there had been no appraisement prior to sale and the published notice of sale contained a misdescription of the property which was referred to as in "Range 1" instead of "Range 4" yet in a collateral proceeding the court held the sale was not void and used the following language.

"As regards the alleged lack of the certificate contained in the published notice, we think that much in this collateral proceeding should be deemed as mere irregularities and that the order of confirmation made by the referee was sufficient to validate the sale under the discretionary power given to the referee by section No. 70-B of the Bankruptcy act."

We now proceed to cite further authorities relating to waiver of gross irregularities in the conduct of judicial sales, all holding that provisions in orders of sale or in statutes which were intended for the benefit of the debtor or creditors may be waived by any of them. By necessary inference all of such cases hold that each sale was not void but merely voidable. After reviewing the law relative thereto we will briefly make clear how in the instant case the petitioner is now absolutely precluded from raising any objection to the sale in question which at most was merely voidable.

The general rule is stated in 35 C. J. 46 as follows:

"Where a party knows of any fact that might constitute an objection to the regularity of the sale, which could be remedied before the sale if made known, and fails to disclose that fact, he will not later be permitted to make such fact the basis of objections to the confirmation."

Citations in foot note 76: Hewit v. Sugar Co., 230 Fed. 394, 399, 144 CCA 563 (cit. Cyc); Central Trust Co. v. Sheffield, etc., Coal etc., Co., 60 Fed. 9; Nix v. Draughon, 56 Ark. 240. 19 SW 669; Cohen v. Wagner, 6 Gill (Md.) 207; Trusts, etc., Co. Ltd. V. Dow, (Alta.) (1921) 2 West Wkly 577. But see McIver v. Thompson, 117 S. C. 175 108 SE 411 (objections may be made up to time of confirmation.)

35 C. J. 34—

"When a public sale is required by *statute*, a private sale is at least voidable, and according to some authorities void, and it is immaterial, under such circumstances, that the order of court did not expressly require a public sale; but if property which should have been sold at public *judicial sale* is irregularly sold at private sale instead, with the acquienscence of one interested, he will be estopped from questioning the validity of the proceeding."

In Lansburgh vs. McCormick 224 F. 874, 876 (4th Cir.) a judicial sale occurred at a different place than that apparently required by law. An interested

party sought to have the sale vacated. After holding that the proceedings were possibly sufficient to meet legal requirements, the court said:

"But if the law were otherwise Lansburgh's conduct in requesting the judge to have the decree of sale carried out as soon as possible, in advertising the sale by pamphlet, *in making no objection though present at the sale and in filing exceptions to the report of sale which made no allusion to the error of the order of sale at Charleston, would estop him from now having the sale annuled*, since the rights of the third parties have become involved," citing Kirk vs. Hamilton 102 U. S. 68.

In the case of In Re: Burr M. F. G. & Supply Co. 217 F 16, 20 (C. C. A. 2 Cir.) The court uses the following language necessary to the opinion:

"Even in the case of serious irregularities a party loses his right by failure to make timely protest. If he has a knowldege of the defects prior to confirmation and makes no protest he loses his right by his laches and one cannot afterwards be heard with a request to have the proceedings vacated (citing) 2 Freeman on executions No. 340."

In Robinson vs. Howard 229 U. S. 254, 264, it was proved that there was a total lack of appraisement and that there was a misdescription of the property in the notice of sale. However the referee confirmed the sale and the U. S. Supreme Court held that the sale was not void, saying:

"As regards the alleged lack of appraisement and the error in the description of the property covered by the certificate contained in the public notice we think they must in this collateral proceeding be deemed as mere irregularities. At that the order of confirmation made by the referee was sufficient to validate the sale under the discretionary power given to the referee by No. 70-b of the Bankruptcy act."

We quote as follows from the headnote in the case of Keyser v. Wessel 128 F. 281 (C. C. A. 3d (Cir.)

"Where a landlord, though not having been notified of the sale of his tenants liquor stock, fixtures and licence in bankruptcy proceedings attended the sale which was made in bulk for a larger sum than was offered for the stock and fixtures and license separately and made no objection to the sale on the hearing of the petition for confirmation he thereby ratified the sale and waived the objection that he was not notified."

In the case of In re Torchis 188 F. 207, 208 (CCA 3d Cir.) the court in applying the rule of estoppel said:

"Not only did the petitioners now before the court have ample notice that the referee was being asked for an order to sell the bankrupt's real estate discharged of liens but they made no objection thereto; and after the order had been made they not only took no steps to have it reviewed by the District Court but they permitted the trustee to go on for months in the

gradual execution of the order and in the distribution from time to time of the proceeds. To use a phrase of the Vulcan Foundary Case *they consented by necessary implication to all that was done* and their belated objection cannot now be regarded with favor."

Finally with reference to the attitude of all courts concerning the desirability of upholding judicial sales whenever possible the Circuit Court of Appeals of the fifth circuit in the very recent decision (1924) contained in Arapian v. Rice 296 F. 891, 892 said:

"The policy of the law does not require courts to scrutinize the proceedings of a judicial sale with a view to defeat them. On the contrary every reasonable intendment will be made in their favor so as to serve, if it can be done consistently with legal rules, the object they were intended to accomplish."

We now apply the foregoing authorities and legal principles to the specific facts in the instant case. Petitioner complains of three irregularities in the proceedings relating to the sale: (1) No hour for the sale was specified in the published notice; (2) The sale occurred at the office of the referee instead of the office of the trustee where it was advertised to occur; (3) There was no literal acutioning of the property to the highest bidder.

As to the failure of the published notice to contain any statement of the proposed hour of the sale. It is doubtful whether this objection would have pre-

sented a serious difficulty even if raised prior to the order of confirmation. In R. C. L. p. 62 we find the following statement:

"In the absence of controlling directions to the contrary in statute or decree of sale, however, it seems that it is not necessary to state in the notice of sale the precise hour of the day at which the sale will be held, provided the hours are named between which it is to take place, and that the hours so named belong to the business portion of the day. Persons who see the advertisement and desire to attend the sale can easily ascertain the hour by inquiring of the parties having it in charge, while to require the advertisement to name the precise hour might lead to practical inconvenience, and often necessitate a postponement of the sale. It is sometimes very desirable for the interests of the parties to delay the sale for two or three hour, in order to await the arrival of persons expected to bid, or in consequence of a storm or some other unforseen emergency, and if a particular hour were named in all cases, the question whether the sale had been held at the hour named might be a fruitful sourse of litigation. Furthermore the above mode of advertising the sale has been so generally in use in some jurisdictions as the most convenient mode, and has been so free from evil consequence, that an advertisement in this form will not be held to be of itself, a sufficient reason for setting aside the sale, where the hours named are within the ordinary business hours of the day."

We can see no important distinction between a notice specifying that a sale will occur during certain

business hours named and a notice specifying that a sale will occur on a certain day, provided it actually occurs at time during business hours. In each case the public may by the same means ascertain the actual hour. However under the decisions previously cited this omission must be held a mere irregularity which could not render the sale absolutely void.

As to the difference in place where the sale occured. Opposing counsel have not cited a single authority holding that the adjournment of a sale from one building to another in the same town would absolutely viliate the entire proceedings. We believe that no such authority can be found. We submit that here also was at most a mere irregularity which might not be given much weight even upon a hearing prior to confirmation, unless it was affirmatively shown that bidding was prevented thereby. It is shown by the return of Sale (T. R. 40, 44) and admitted by petitioner that her counsel was present at the office of the trustee where the property was offered for sale, but as only one bidder was present the sale was adjourned to the office of the referee where the sale occured. The proceeding was informal because it was clear that there was to be no competitive bidding and the sole bidder desired the sanction of the referee. No objection was raised to the adjournment to a different office a few minutes before the actual sale occured.

As to the contention that the sale was a private

sale and not one at public auction. In this connection council cite a decision. In in re Nevada 202 F 126, (their brief p. 15) which seems to us absolutely destructive of their contention in this regard. The court soundly holds "that the public be invited to attend and bid is the essential feature of a public sale." Because in that case the notice was addressed solely to "creditors, stockholders and other parties in interest" and not to the general public the court necessarily held it was a private sale. But in the instant case the advertisement (T. R. 39) gave notice of a sale to the "highest bidder for cash" without restriction. Here the essential feature of a public sale was therefore present. As there was only one bidder on hand useless formality was not required. There is not a hint in the record that any one present was not given full opportunity to bid in the same manner as if a public auctioneer with a loud voice had been present. Here again we have at most a mere irregularity, but absolutely nothing to render void the sale.

All objections raised by petitioner relate only to irregularities or informalities in procedure and do not present anything like the serious difficulties which arose in the decisions quoted in the earlier portion of this brief. Yet in those decisions the sales were held to be merely voidable. On page sixteen of petitioner's brief only two cases are cited in chief support of counsel's contention. In Blanke Mfg. Co. v. Craig 287,

F. 345, cited, there were striking variations in the trems of the sale as actually made from the terms as stated in the published notice. In holding the sale void the court avoided any discussion of legal principles and quoted no authority except general references to Corpus Juris and Ruling Case Law merely holding that the general law of judicial sales applies to a sale by the referee in bankruptcy. The case of Siminole Fruit Co. v. Scott 291 F. 179, the other authority cited, is a District Court case involving a tax sale and it is impossible to determine therefrom when the objections were raised, whether before or after confirmation. So far as we can see the decision has not bearing whatever on the instant case.

IN ANY EVENT PETITIONER CONSENTED BY NECESSARY IMPLICATION TO SUBSTANTIALLY ALL THAT WAS DONE AND SHE IS NOW ESTOPPED FROM BELATED OBJECTIONS.

Note the sequence of conduct on behalf of petitioner by her attorneys.

1. Signature of a stipulation "for the purpose of obtaining without legal formalities an order of this court to sell the aforesaid described properties free from all liens" and conditioned only that the proceeds derived therefrom should be sufficient to pay all administration expenses, costs of sale and attorneys fees.

2. Petition asking to be relieved from the fore-

going stipulation only on the ground that certain actions in the state court had not been dismissed.

3. No review of the referee's order denying the petition.

4. Presence of petitioner's attorneys at the sale without objection as to the place or manner of conducting same.

5. After full knowledge of all proceedings no effort to avoid a confirmation of the sale, notwithstanding the sale occurred on February 7, 1924 (T. R. 40) and the order of confirmation was not made until March 3, 1924 (T. R. 24.)

6. The filing on February 12, 1924 of objections by petitioner to allowance of expenses of sale based solely on the unreasonableness of same with no mention made as to claim of invalidity of sale.

7. Delay until October 13, 1924 (T. R. 65) over eight months after sale (T. R. 44) and over seven months after order of confirmation (T. R.) before filing petition to set aside sale.

During all of the foregoing period since confirmation of sale the purchaser of this property has remained bound under contract of purchase and has suffered the risk of loss by depreciation. Surely the law will not permit a single objector thus actively to participate in proceedings before and after a sale even to the point of taking part in the determination of the allowance of fees and expenses and by her every action to indicate her ratification of substantially all that occurs, but finally to assert, over seven months thereafter, that the whole proceedings are utterly void. We

again quote the language of the Circuit Court of Appeals (4th Cir.) in Landsburgh vs. McCormick 224 F 874, 876 supra, where the court said that notwithstanding the sale was held in a different county than apparently required by statute the petitioner's conduct,

"in making no objection, though present at the sale, and in filing exceptions to the report of sale which made no allusion to the error of the order of sale at Charleston, would estop him from now having the sale annuled since the rights of third parties have become involved."

We therefore submit that the order of the District Court in denying the petition for review and in confirming the sale by the trustee should be affirmed and the petition for revision herein should be denied.

Respectfully submitted,

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Arthur E. Price
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